Editor's note: Reconsideration denied by order dated July 8, 1974; Appealed -- reversed and remanded, Civ. No. 74-689 (D. Colo. Jan. 14, 1976), 406 F.Supp. 214, aff'd, Nos. 76-1452, 76-1767 (10th Cir. Nov. 7, 1977)

JOHN V. HYRUP

IBLA 73-388 Decided June 12, 1974

Appeal from decision of Colorado State Office, rejecting an application for a right-of-way and requiring an amended application. (C-16084)

Affirmed.

Public Lands: Classification--Withdrawals: Springs and Waterholes

The fact that an application for a water pipeline was filed prior to an official determination that the legal subdivision in question contains a spring of the type intended by the Executive Order of April 17, 1926, which created Public Water Reserve No. 107, does not render the Executive Order inoperative as to such land, since the withdrawal order covered all subdivisions of that character, and the subsequent designation merely constitutes an official finding that the land is of that character and has the status defined in the withdrawal order and is subject thereto.

Act of July 26, 1866--Rights-of-Way: Generally--Rights-of-Way: Act of March 3, 1891--Rights-of-Way: Act of February 15, 1901

No new right-of-way may be acquired pursuant to the Act of July 26, 1866, the right-of-way clause in that Act having been entirely superseded by subsequent legislation. A right-of-way to convey water may be granted only under the Act of March 3, 1891, as amended, or the Act of February 15, 1901, as amended, depending upon its purpose.

APPEARANCES: Frank Delaney, Esq., Glenwood Springs, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

John V. Hyrup appeals from a decision dated April 18, 1973, of the Colorado State Office rejecting an application for a right-of-way filed pursuant to 43 U.S.C. § 661 (1970) because the right-of-way provision of this statute was superseded by subsequent legislation.

The land in question is public domain under the jurisdiction of the Bureau of Land Management located in Sections 8 and 9, T. 8 S., R. 86 W., 6 P.M. Colorado. Hyrup proposed to convey water from a spring which rises on public land to his property situated near the town of Basalt by means of a pipeline. Having surveyed the property, he prepared a map and a statement of claim for the appropriation of water which he filed with the Office of the Colorado State Engineer on March 14, 1969, pursuant to Colorado law. Since most of the footage for this proposed pipeline followed a course along the borrow pit of a public county road, appellant obtained an easement from Eagle County in May 1969 to construct and maintain a pipeline. The Bureau of Land Management contends that the United States owns this land, and not the county. 1/

On June 3, 1969, appellant applied to the District Court of Garfield County in and for former Water District No. 38 for a decree to appropriate the water of the springs in issue. On November 5, 1971, appellant obtained a conditional decree for such right. The Bureau of Land Management informed Hyrup in April 1972, that it was necessary to file an application with the Bureau for a right- of-way in order to obtain a legal right to convey the water. Hyrup filed an initial application for right-of-way on April 10, 1972, with copies of the documents filed with the State Engineer and a copy of the decree issued by the Court.

The Bureau's Denver office acknowledged the filing of this application in a letter dated April 17, 1972, the last paragraph of which reads as follows:

1/ Hyrup contends that the Colorado Midland Railroad formerly had a right-of- way where the present road is and the Railroad sold it to Eagle County which granted an easement to him. The Bureau asserts that the Railroad had relinquished the right-of-way to the United States, which still retains title thereto.

> The filing of your application confers no right upon you either to settle upon or to occupy the lands applied for prior to Notice of Approval from this office. The unauthorized use or occupancy of public lands of the United States constitutes a trespass against the United States.

Having been advised by the Bureau of Land Management that his first application was deficient, he submitted a supplemental application on June 21, 1972. Meanwhile, Hyrup purchased pipe at an estimated cost of $5000 to $6000. On April 25, 1972, Hyrup filed an application in the Water Court 2/ to establish that he had used due diligence in the prosecution of his efforts to perfect the conditional appropriation. In re The Application for Water Rights of John V. Hyrup to Hyrup Springs and Pipeline, Case No. W-562. On June 30, 1972, the United States filed a Statement of Opposition to this pipeline. On August 16, 1972, the Chief, Division of Technical Services, sent a memorandum entitled "Interpretation: Public Water Reserve No. 107" to the Chief, Branch of Records and Data Management. This memorandum was to inform that branch that the NW 1/4 NW 1/4 of sec. 9, T. 8 S., R. 86 W., was designated as a public water reserve pursuant to the Executive Order of April 17, 1926. By this order, every smallest legal subdivision of the public land survey which is vacant unappropriated, unreserved public land and contains a spring or a water hole and all land within one-quarter of a mile of a spring or a water hole located on unsurveyed public land was withdrawn from settlement location, sale or entry and reserved for public use in accordance with 43 U.S.C. § 300 (1970) and in aid of pending legislation. Hyrup asserts he was informed of this designation around August 30, 1972.

On April 11, 1973, Hyrup was issued an order by the Bureau, notifying him that he is liable for trespass damages and ordering him to cease and desist all construction and related activities which involve national resource lands. It is alleged by the Bureau that appellant, in apparent disregard of this order, then proceeded to connect the pipeline and begin the flow of water to his residence.

By decision of April 18, 1973, Hyrup's application for a right-of-way was rejected because the right-of-way clause contained in the 1866 statute under which he had previously filed had been superseded by other statutes, infra. The decision stated that Hyrup

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2/ Otherwise identified as the District Court in and for Water Division No. 5, State of Colorado.

would be allowed 30 days from receipt thereof to file under the provisions of the Act of February 25, 1901. The decision noted that Hyrup had proceeded to construct the pipeline and use water from the spring, despite a written order from the State Office to the contrary.

On appeal, Hyrup claims that he has obtained a vested right to the use of the water for agriculture, domestic and other purposes 3/ by following the procedures under Colorado law for acquiring such a right. He believes that this right should be recognized under 43 U.S.C. § 661 (1970) which provides as follows:

> Whenever, by priority of possession, rights to the use of water for a mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed * * *.

We agree that Executive Order of April 17, 1926, would not be applicable if the appellant could show that he has a prior and subsisting vested right to the waters of the spring in question. Thomas Morgan, 52 I.D. 735 (1929). We find, however, that appellant's right did not vest because his application for a decree to appropriate the waters of the spring was not filed with the District Court of Garfield County until June 3, 1969, long after the Executive Order of April 17, 1926, became effective.

Hyrup makes reference to the fact that as of August 16, 1972, the NW 1/4 NW 1/4, sec. 9, T. 8 S., R. 86 W., which encompasses the spring in question, was designated as a public water reserve. He reasons that this designation was necessary to make the Order of April 17, 1926, effective. He states that if the Order had effectively withdrawn the springs there would have been no need for the designation issued on August 16, 1972. Therefore, he argues that his right vested prior to August 16, 1972, and should be protected.

3/ Appellant advised the Colorado State Office that, "The primary purpose of this application and the right-of-way requested is to convey water for domestic purposes including the sprinkling of a lawn." Letter dated June 21, 1972.

This contention betrays a basic misunderstanding by appellant of the nomenclature and effect of both the 1926 Executive Order and the 1972 designation. The facts are that on April 17, 1926, the President of the United States created Public Water Reserve No. 107 by an order of withdrawal worded as follows:

> Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases", as amended by act of Congress approved August 24, 1912 (37 Stat., 497), it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the act of December 29, 1916 (39 Stat., 862), and in aid of pending legislation.

Appellant maintains that this Executive Order was of no effect. He has not pointed to any deficiency in the President's order which would render it a nullity. Instead he argues that if the order was not totally ineffective to accomplish the withdrawal of the springs and the surrounding public land it would not have been necessary to impose a specific withdrawal of the lands in August 1972.

There was, in fact, no "subsequent withdrawal" in 1972. The 1926 Executive Order did not specify any particular tracts of land, nor did it undertake to list all the lands affected thereby. Instead, which it described. All that happened relative thereto in 1972 was that a memo was written between officers of the Bureau advising that the NW 1/4 NW 1/4 of section 9, T. 85., R. 86 W., 6th P.M., Colorado, had been identified as containing a water hold or well of the type contemplated by the 1926 Executive Order and was, accordingly, withdrawn by that order from settlement, location, sale or entry, and reserved for public use. The appropriate records were then noted to so reflect. The appellant, therefore, is in error in his contention that a second withdrawal was necessary in 1972 because the 1926 withdrawal was not efficacious.

The fact the application for appropriation of the water was filed prior to the date of the interpretative memorandum of August 16, 1972, is of no consequence. The withdrawal took effect as to all subdivisions of "vacant, unappropriated, unreserved public lands containing waters described in the order", as of April 17, 1926, the subsequent interpretative memorandum being no more than an official finding that a certain tract is of the character and has the status defined in the order and is subject thereto. Lee J. Esplin, 56 L.D. 325 (1938).

In another case involving this same issue it was held that the fact that a State selection list was filed prior to an interpretative order holding that a definite legal subdivision of public land was found to contain springs or water holes of the type intended by the withdrawal order to be withdrawn does not render said order inoperative as to such land, since the said withdrawal order embraced all subdivisions of the "vacant, unappropriated, unreserved public lands" containing the waters described in said order. The interpretative order is in effect an official finding that a certain tract described in terms of legal subdivision is of the character and has the status defined in the withdrawal order and is subject thereto. State of New Mexico, 55 I.D. 466 (1936).

In Jack A. Medd, 60 I.D. 83, 98-100 (1947), the Department considered a case on all fours with this one. There Medd contended that he had appropriated waters under state law which were withdrawn by the Executive Order of April 17, 1926, and reserved for public use as part of Public Water Reserve No. 107. This Department held:

> The appellant's contention in his fourth specification of error and in the third, fourth, and fifth points of his argument dealing with this specification, to the effect that, under permits issued by the State of Arizona to his predecessor, Kelley, and by the State assigned to Medd, he has the right to use the waters involved in this appeal, is untenable for the reason that such waters had already been reserved by the President for public use before Kelley applied to the State of Arizona for the permits.
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> As previously noted, the order creating Public Water Reserve No. 107 reserved for public use--
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> > * * * every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole * * *.

The order was issued pursuant to section 10 of the act of December 29, 1916, which authorized reservation of--

> * * * lands containing water holes or other bodies of water needed or used by the public for water purposes * * *

The term "land" is frequently used in the law of real property to connote and include all the incidents of the land, among which is the water on the land. That the Congress used the word "lands" in this comprehensive sense in section 10 of the act of December 29, 1916, and intended to authorize the reservation of waters as well as terra firma is indicated by the legislative history of the section. In its report, the House Committee on Public Lands stated with respect to section 10 (then designated as section 11 of the bill) that it authorized the withdrawal from entry, and the holding open for the general use of the public, of--

> * * * important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country * * *

Therefore, when the President, in the order creating Public Water Reserve No. 107, withdrew "every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole," he withdrew the waters in the springs and water holes, as well as the other elements of the lands affected by the order.

Accordingly, the nonnavigable waters of Antelope Creek and of Bluff and Walnut Springs, as found in the 120 acres of section 24 here in question, were not subject to appropriation under State laws when the appellant's predecessor, Kelley, applied on August 21, 1941, to the Arizona Water Commissioner for permission to appropriate such waters, because these waters, being wholly unappropriated as of April 17, 1926, and therefore free from any rights previously vesting, had been reserved in their entirety on April 17, 1926, by the President of the United States. It necessarily follows that the permits issued to Kelley under the authority of the State of Arizona were ineffective and that neither he nor the appellant acquired any rights to these waters. Instead, they have made unauthorized

> use of the Government's waters and are liable in trespass because of such use. Also, in entering these reserved lands of the United States and in constructing upon them the diversion works and the pipe line previously mentioned, without obtaining permission for such entry and a right-of-way in accordance with the regulations of this Department, both Kelley and Medd have made unauthorized use of the surface of the Government's lands as well as its waters and are liable in trespass by virtue of such action.
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> Arguments against the power of Congress to authorize the reservation of unappropriated nonnavigable waters on the public domain in Arizona or against the validity of a President order effecting such a reservation, based upon the asserted ownership of these waters by the State Arizona, cannot be accepted by the Department of the Interior To this Department, all statutes of the United States and all official actions of the President are valid unless the contrary has been established by judicial proceedings. With regard to the question of the ownership of the unappropriated nonnavigable waters on the public domain, this Department adheres to the position that was taken by the executive branch of the Government in the case of Nebraska v. Wyoming, 325 U.S. 589, 611-616 (1945). * * *

Withdrawals of public lands under authority of the Executive order of April 17, 1926, in keeping with constructions of other withdrawal orders of public lands, are deemed continuing in operation in the absence of words of limitation, and attached not only to lands which at the time of issuance of the order are known to be of the character and status defined therein, but also to public lands subsequently found to be of said character and status. State of New Mexico, supra.

The Executive Order of April 17, 1926, was effective as of that date, and so in order for appellant to have a vested right within the meaning of 43 U.S.C. § 661 (1970) it would have been necessary for him to have established such right prior to April 17, 1926.

The withdrawal covered all lands containing water oles or other bodies of water "needed or used by the public for watering purposes" 43 CFR 2311.0- 3(a)(2). However, the determining factor set by the regulation is the quantity of water available for general use rather than a demonstration of present public use. That is, small springs or seeps which are capable of "affording only enough water for the use of one family and its domestic

animals" would not be found to be within the ambit of the order, whereas a spring "capable of providing enough water for general use for watering purposes" would be withdrawn.

The total volume of water produced by the spring is not reflected in the record. However, the State authorized appellant to appropriate 1.71 cubic feet of water per second.

Appellant's contention that the spring was not withdrawn by the 1926 order could, absent other considerations, raise an issue of fact regarding whether the spring is really of the character contemplated by the order and the regulation, and a hearing might be necessary to resolve this issue. However, this will not be required in light of our resolution of the issue of the right of way.

Even if we assume, arguendo, that Hyrup did have a vested right under Colorado law to appropriate the waters from the spring, which right was protected by 43 U.S.C. § 661, this would not entitle him to a right-of-way over federal land. Utah Power and Light Company v. United States, 243 U.S. 389, 410, 411 (1916). Water rights are distinct from rights-of-way over public land and are so treated by statute. The Acting Solicitor's Opinion on Right-of-Way for Ditches and Canals, issued July 16, 1942 (58 I.D. 29), discussed at length the issue of whether the right-of-way clause in the Act was superseded by subsequent legislation. It was his opinion that the right-of-way clause in § 2339 of the Revised Statutes, now 43 U.S.C. § 661, has been entirely superseded by s 1 of the Act of May 11, 1898, 30 Stat. 404, 43 U.S.C. § 956 (1970). This Act was superseded by the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959 (1970). Therefore, appellant is not entitled to a right-of-way under 43 U.S.C. § 661 (1970).

If a right of way could still be obtained under the 1866 Act, Hyrup would not have to apply for it. The right of way provision of that Act was self- executing and required no Departmental approval, provided, of course, that the right to the use of the water had vested. 58 I.D. at 39. But since no new rights of way may be obtained under that Act, a right of way of this sort may be obtained only under the Act of March 3, 1891, as amended (43 U.S.C. 946), or the Act of February 15, 1901 (43 U.S.C. 959), depending upon its purpose. Hyrup's description of his intended use is less than adequate (see fn. 3), but on the basis of the information provided the BLM State Office concluded that the 1901 Act is the appropriate statute, and it so advised the appellant.

The State Office decision informed appellant of the possibility that he might apply for permission to use the water and for a right of way to transport it across the public land. He has not done so. He apparently believes that he has a right to the water and a right of way for his pipeline and that he does not need authority from this Department for either. He cites Hunter v. United States, 388 F.2d 148 (9th Cir. 1967), in support of his contention that he may still secure a right of way under the 1866 Act. Hunter, however, holds only that a person who has a right to waters appropriated in the 1880's (well before the 1926 withdrawal) should be allowed to divert the waters by one of the methods contemplated by the 1866 Act. The Court said nothing about the effect of later acts or later withdrawals.

Therefore, the State Office properly held that Hyrup could not construct a pipeline across this public land and convey water without a right of way granted by this Department, and in doing so he was in trespass

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Martin Ritvo
Administrative Judge